Atlas Transit Mix Corp. *and* Building and Material Teamsters, Local 282, International Brotherhood of Teamsters, AFL–CIO. Case 29–CA–17636

June 30, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On September 19, 1994, Administrative Law Judge Steven B. Fish issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief.

On April 17, 1995, while exceptions were pending before the National Labor Relations Board, the Respondent filed a motion to reopen the record. On July 13, 1995, the Board remanded the proceeding to the judge to reopen the record to take further evidence and to address the contentions raised by the Respondent's motion.

On September 9, 1996, the judge issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, the Charging Party filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision, the supplemental decision, and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified[2] and set forth in full below.

In its exceptions the Respondent argues that the judge erred when he failed to find that the Respondent made a valid reinstatement offer on September 2, 1993. We find no merit to this exception.

The judge found that although the September 2, 1993 letter states that it is confirming an earlier oral reinstatement offer, that purported oral offer never occurred. Even assuming the oral offer had been made, the Respondent's exception is without merit for the same reason the judge found that the September 14, 1993 reinstatement offer was invalid: The Respondent's September 2, 1993 reinstatement offer would have required the employees to return under the terms of the expired contract at a time when the employees were entitled to be reinstated under the terms of the agreement reached between the Association and the Union to which the Respondent was bound. *Harding Glass Industries*, 248 NLRB 902, 907 (1980), enfd. 672 F.2d 1330, 1339 (10th Cir. 1982).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Atlas Transit Mix Corp., Jamaica, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) During the negotiations for the renewal of a collective-bargaining agreement, withdrawing from the negotiations without the consent of Building and Material Teamsters, Local 282, International Brotherhood of Teamsters, AFL–CIO.

(b) Refusing to abide by the terms of the memorandum of agreement reached between the Union and the Association on August 31, 1993.

(c) Informing employees that they were being discharged because of their activities on behalf or in support of the Union.

(d) Discharging or refusing to reinstate employees because they have engaged in a strike or other activities on behalf or in support of the Union.

(e) Bypassing the Union by dealing directly with employees concerning terms and conditions of employment.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

The Charging Party's motion to strike the Respondent's exceptions to the supplemental decision is denied. Although not in complete conformity with the Board's Rules, the exceptions are not so deficient as to warrant striking.

[2] We shall modify the par. 2(b) in the judge's recommended Order to conform with his recommended notice. We shall also conform the recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

We note that in its answer the Respondent denied that the Union was the exclusive representative of its employees pursuant to Sec. 9(a) of the Act. The judge, however, found that the Respondent was the exclusive representative of the Respondent's employees, and he applied *Retail Associates*, 120 NLRB 388 (1958), without limitation. The Respondent's exceptions and supporting briefs do not assert that its relationship with the Union was governed by Sec. 8(f) of the Act. Under these circumstances, we find that the Union is a 9(a) representative. See Sec. 102.46(b)(2) of the Board's Rules. ("Any exception . . . not specifically urged shall be deemed to have been waived.")

Chairman Gould finds it unnecessary to decide whether the Respondent's exceptions are sufficient to raise an issue as to whether its relationship with the Union is governed by Sec. 8(f) and therefore controlled by *James Luterbach Construction Co.*, 315 NLRB 976 (1994) (Chairman Gould, concurring), or by Sec. 9(a) and therefore controlled by *Chel LaCort*, 315 NLRB 1036 (1994). Since the Respondent authorized the Association to represent it in negotiations for the successor collective-bargaining agreement, the result is the same whether the relationship is governed by Sec. 8(f) or 9(a).

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer George Dempster, Emmet Harding, Alex Araujo, Jose Rivera, Henry Martelly, Michael Washington, Sergio Martin, and William Thornton full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make George Dempster, Emmet Harding, Alex Araujo, Jose Rivera, Henry Martelly, Michael Washington, Sergio Martin, and William Thornton whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the judge's decision.

(c) Notify the Union in writing that it will honor and abide by the terms of the memorandum of agreement reached by the Union and the Association on August 31, 1993, and honor and abide by the terms of the agreement, and make whole all employees for any losses resulting from its refusal to abide by the agreement, in the manner set forth in the remedy section of the judge's decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Jamaica, New York, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 14, 1993.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT, during negotiations for the renewal of a collective-bargaining agreement, withdraw from the negotiations without the consent of Building and Material Teamsters, Local 282, International Brotherhood of Teamsters, AFL–CIO.

WE WILL NOT refuse to abide by the terms of the memorandum of agreement reached between the Union and the Association on August 31, 1993.

WE WILL NOT inform employees that they were being discharged because of their activities on behalf of or in support of the Union.

WE WILL NOT discharge or refuse to reinstate employees because they have engaged in a strike or other activities on behalf or in support of the Union.

WE WILL NOT bypass the Union by dealing directly with employees concerning terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer George Dempster, Emmet Harding, Alex Araujo, Jose Rivera, Henry Martelly, Michael Washington, Sergio Martin, and William Thornton full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL notify the Union in writing that we will honor and abide by the terms of the memorandum of agreement reached by the Union and the Association on August 31, 1993, and WE WILL honor and abide by the terms of the agreement, and make employees whole for any losses resulting from our refusal to abide by the agreement.

WE WILL make appropriate payments to the Union's funds as required in the agreement.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

ATLAS TRANSIT MIX CORP.

Catherine Creighton, Esq., for the General Counsel.
Sanford E. Pollack, Esq. and *Gary C. Cooke, Esq. (Horowitz & Pollock, P.C.)*, of South Orange, New Jersey, for the Respondent.
Bruce S. Levine, Esq. (Friedman & Levy-Warren), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN B. FISH, Administrative Law Judge. Pursuant to charges filed by Building and Material Teamsters, Local 282, International Brotherhood of Teamsters, AFL–CIO (Local 282 or the Union), the Regional Director for Region 29 issued a complaint on October 20, 1993,[1] alleging that Atlas Transit Mix Corp. (Respondent) violated Section 8(a)(1), (3), and (5) of the Act. The hearing with respect to the allegations raised by the complaint was heard before me in Brooklyn, New York, on May 16, 1994.

Briefs have been filed and have been carefully considered. Based on the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a New York corporation with its principal place of business in Jamaica, New York, where it is engaged in the business of providing services as a contractor in the building and construction industry and supplying ready mix concrete, sand, gravel, and bulk cement to various enterprises.

Annually, Respondent derives gross revenues in excess of $500,000 and purchases and reserves at its Jamaica facility, fuel, oil, goods, and materials valued in excess of $50,000 directly from points located outside the State of New York.

Respondent admits, and I so find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted and I so find that the Union is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

Respondent has been a member of the New York City Concrete Producers, Inc. (the Association), which has been engaged in representing various members, including Respondent in various activities, including negotiations of collective-bargaining agreements. Based on such membership, Respondent has recognized the Union as the collective-bargaining representative of its employees, and has enforced and maintained a series of collective-bargaining agreements negotiated by the Association,[2] the most recent of which expired on June 30.

Respondent authorized the Association to represent it, in the negotiations for a successor agreement, which were conducted over the months of June, July, and August. Tom Polsinelli, one of Respondent's owners, and an admitted agent, was a member of the Association's negotiating committee and personally participated in and attended negotiation sessions, until Respondent's letter of withdrawal of August 26.

On July 14, the Association submitted what it characterized as its "final offer" to the Union, which was rejected. On July 20, the employees represented by the Union and employed by the Association, including Respondent's employees, went out on strike.

In mid-August, Tom Polsinelli approached employees George Dempster, Henry Martelly, Emmet Harding, Michael Washington, Alex Argujo, Sergio Martin, Jose Rivera, and William Thornton and offered to give the employees their jobs back at a wage rate of $23 per hour, plus U.S. Healthcare, if they would come back to work without the Union. The employees rejected Polsinelli's offer and continued to picket.[3]

The parties continued to meet and bargain after the commencement of the strike. On July 21, the Union signed a new collective-bargaining agreement with the Nassau/Suffolk Ready Mix Association, another Association, which consists of employees located in Nassau and Suffolk counties (Long Island agreement or the Long Island group respectively).

The Long Island agreement contained a new provision, which altered prior practice, and permitted employers to schedule a regular workday on a variable start basis between 6 to 8 a.m. Prior practice called for a set start time of 8 a.m., plus time and a half pay for any employees required to start prior to 8 a.m. The proposal for a "variable start time" was a significant issue throughout the negotiations between the Association and the Union, particularly subsequent to the Long Island agreement being reached.

The Association proposed a change to a variable start time very early in the negotiations, and requested that it be from 6 to 9 a.m. The Union responded that it would discuss the matter, and was prepared to give the Association some relief with respect to start time. The Union would not agree to the 6 a.m. start time, however, and informed the Association that the employees would not agree to such a time. The parties continued to discuss and bargain over the issue. Each side gave their reasons, and counterproposals were exchanged on the subject.

[1] All dates are in 1993 unless otherwise indicated.

[2] The specific employees covered are all full and regular part-time, chauffeurs, excluding guards, and supervisors as defined in the Act.

[3] The above finding is based on a compilation of the credited portions of the testimony of Dempster and Martelly, which was not denied by Polsinelli. Additionally, Respondent stipulated that the other six employees would testify in a similar manner to Dempster and Martelly. I do not, however, credit the testimony of Martelly, which was not corroborated by Dempster, that Polsinelli offered to make the payments of their salary "off the books."

Although the Long Island agreement was entered into on July 21, the Association had received information about the proposed terms of the agreement at some earlier time. The Association proposed that the parties agree to the same terms as the Long Island group, particularly the variable start time provisions. The Union rejected this proposal, asserting that its employees would never ratify such an agreement for the New York group, and that the Long Island group had a greater need for such relief because of the greater amount of nonunion competition in Nassau and Suffolk County, as opposed to New York City, where the Association's members were located.

The variable start time issue became the primary stumbling block to reaching agreement. The Association's members, including and especially Polsinelli were outraged that the Union would not give the same agreement to the Association as it had to the Long Island group. According to Alex Miuccio, the Association's chief negotiator, the consensus of the Association's members was that the Union's strategy (i.e., not agreeing to the same agreement as the Long Island group) "bordered on illegality."

During the course of the bargaining over the variable start time issue, Miuccio mentioned that the Association had a most-favored-nations clause in the prior agreement, which would entitle the employers in the Association to the same terms as the Long Island group. At that point, the Union asked for a caucus and its attorney proposed that the most-favored-nations clause be modified to exclude the Long Island group from the application of the clause.

The positions then hardened, and after the Union rejected what was characterized as the Association's final offer, the Association notified the Union in writing that an impasse had been reached.

After the strike began, the parties continued to bargain, with the variable start time issue and the Union's refusal to agree to the same terms as the Long Island Group the main issue for discussion. Polsinelli during the caucuses of the Association's members expressed vehement insistence on "going to the wall," on obtaining the same conditions as the Long Island group, including the most-favored-nations clause. Polsinelli also stated on more than one occasion that Respondent could not "survive" with the conditions that the Union was proposing. Polsinelli also expressed the opinion that the Union was bargaining in bad faith, by treating drivers differently (i.e., giving different terms to the Long Island group).

The last meeting attended by Polsinelli was August 23. At that meeting Polsinelli stated to the Association's members that Respondent could not live with the contract as it existed. He announced to the Association that Respondent was going to withdraw from the Association, because he "saw the direction that the committee was going." In that connection, some members of the Association's committee began to complain about the financial pressures of the strike, and expressed that they were ready to give in to or as Miuccio characterized it to "cave in" to the Union's demands.

Polsinelli did not tell the Association members at the August 23 meeting that Respondent was withdrawing from the Association because of the existence of an impasse.

Thereafter, Respondent sent a letter, dated August 26 to the Union and the Association, stating that it resigned from the Association, "due to the fact that we are in a bargaining impasse."

On August 31, the Association and the Union signed a memorandum of agreement, which provided for a variable start time of between 7 and 8:30 a.m., and a modified most-favored-nations claimer that excludes the Long Island agreement from its coverage. The agreement also provides for a return to work for all striking employees without loss of benefits or seniority.

On September 1, after the members of Local 282 ratified the agreement, the Union instructed Respondent's employees to report to work. On September 2, all of Respondent's eight employees reported for work. George Dempster, the Union's shop steward, told John Polsinelli, another of Respondent's owners, that the strike was over and that the men were ready to go back to work. John Polsinelli replied that he did not have work for the men, that "I don't hire union drivers," and "there is no union here anymore."

On that same day, September 2, Respondent sent a letter to the Union, signed by Tom Polsinelli asserting that Respondent was, "confirming my offer to the employees this morning, they should all report to work under the conditions of the now expired contract while we continue to negotiate." This letter was not sent or shown to the striking employees. Neither Polsinelli testified, and Respondent adduced no other evidence that this alleged offer was ever communicated to the employees. As noted above, I have found above based on the undenied testimony of employees of Respondent, that Respondent made no offer of reinstatement of any kind to the employees at that time, and to the contrary told them there was no work for them, that Respondent doesn't hire union drivers, and "there is no union here anymore."

The employees made no reply to Polsinelli, but went back out in front of Respondent's premises and began picketing.

By letter dated September 3, the Union's president, Neil Maderonna, replied to Respondent's two previous letters. The letter asserted that Respondent's attempt to withdraw from the Association was untimely and ineffective, and demanded that Respondent comply with the terms of the contract reached between the Union and the Association. The letter adds that by refusing to abide by the terms of the agreement, Respondent was committing an unfair labor practice.

Further, the letter referred to Respondent's assertion in the September 2 letter that it was prepared to have the men report to work under the terms of the "now expired contract." This conduct, according to the Union was an additional unfair labor practice, and the strike was now "an unfair labor practice strike." The letter concludes by stating that the men will report to work after Respondent confirmed in writing that it will abide by the terms of the contract between the Union and the Association.

Based on further instructions from the Union, Respondent's employees again attempted to report to work on September 7. At this time, John, Tom, and Vincent Polsinelli were all present. Once again, Dempster, the shop steward, spoke on behalf of the other seven employees, as well as himself. Dempster asked where the employees' timecards were, and stated that the employees were there ready to go to work. John Polsinelli replied he didn't have any work for

the men, "I don't hire union drivers," and "you don't work here for us, there are no union members."[4]

Dempster asked if Polsinelli was sure and if that was his last word on the matter. Polsinelli replied, "[Y]es, that's it, there is no more work for you guys."

The employees then resumed picketing outside Respondent's premises.

Respondent sent a letter to all striking employees, dated September 14 with a copy to the Union. The letter reads as follows:

> As you know, we have in the past offered you your job back under the final offer which was submitted to the Union on July 14, 1993. We would like to call to your attention the fact that should you at any time make a claim that your actions are protected under any of the Statutes of the United States or you are entitled to "back-pay," you would have an obligation to minimize damages.
>
> It is our intention that the offer (which we are renewing by this letter) places you in a position of refusing to minimize the potential damages.
>
> This letter is not intended to address the issue as to whether or not an offer of reinstatement is made, but is solely intended to offer you employment at those terms which we offered to you when you stopped working.
>
> You may also be assured that we will be giving the Union, if any when you return to work, the monies due in your behalf under the terms of the final offer since we believe that it is our obligation to continue the benefit.

The employees turned the letters over to the Union, and did not thereafter attempt to report to work. Nor did either the Union or the employees respond to the September 14 letter. The Union filed its initial charge on September 14, and a first amended charge on October 8, alleging that Respondent violated Section 8(a)(1), (3), and (5) of the Act.

III. ANALYSIS

A. *Respondent's Withdrawal from the Association and Refusal to Abide by the Terms of the Association Agreement*

Once collective bargaining has begun, an employer may lawfully withdraw from existing multiemployer bargaining, only upon initial consent or if the employer can demonstrate the existence of "unusual circumstances." *Retail Associates*, 120 NLRB 388, 395 (1958). There is no dispute herein that Respondent was a member of the Association, and did not withdraw prior to the commencement of bargaining. Indeed, as noted, Respondent actively participated in the bargaining until its untimely withdrawal on August 26.

Therefore, the sole issue[5] to be resolved is whether or not Respondent has demonstrated the existence of "unusual circumstances," which motivated its decision to withdraw from multiemployer bargaining. Respondent has made a number of different arguments both at the hearing and in its brief, which in its view establish "unusual circumstances," sufficient to justify its otherwise untimely withdrawal.

I conclude that none of Respondent's contentions[6] made at trial or in its brief, either singly or collectively come close to establishing the requisite "unusual circumstances" that would justify its untimely withdrawal from bargaining.

At trial, Respondent raised two contentions that it characterized as sufficient "unusual circumstances." It claimed that "unusual circumstances" were established by virtue of the fact that the parties were at "impasse," and that the Union was guilty of bad-faith bargaining.

As to the first of these contentions, the Supreme Court has upheld the Board's view that impasse is not an "unusual circumstance that allows a withdrawal from a multiemployer unit. *Charles D. Bonanno Linen Service*, 454 U.S. 402, 411 (1982).

Concerning the second contention, even if bad-faith bargaining can be construed as an "unusual circumstance,"[7] I conclude that Respondent has fallen far short of establishing that the Union bargained in bad faith during the instant negotiations. It contends in this regard that the Union come into the negotiations without an intention to reach agreement, particularly with respect to the variable start time issue, and that the Union bargained to impasse over a nonmandatory subject of bargaining, a most-favored-nations clause. These contentions are clearly without merit.

Respondent relies primarily on the fact that the Union refused to agree to give the Association the same terms and conditions it agreed to with the Long Island Group, particularly concerning the variable start time issue. Such action is insufficient, however, to establish bad-faith bargaining. The Union is under no legal obligation to grant identical terms to every employer or every Association with whom it bargains. It is required to bargain with a sincere intent to reach an agreement, but it need not agree to any specific proposal or concession. *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984).

Here, the Union met with the Association regularly, engaged in substantive bargaining about the variable start time proposal from the outset of negotiations, and in fact initially stated that it would be amenable to giving the Association some relief in that area, albeit not the proposal advanced by the Association. The Union also provided reasons to the Association for its refusal to agree to the same proposal as it agreed to with the Long Island group, made counterproposals to the Association's demand, and in fact eventually agreed to a variable start time proposal that differed from the prior

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[4] The above findings based on a compilation of the credited and undenied testimony of Dempster and Martelly, as well as the fact that Respondent stipulated that other employees would have testified similarly.

[5] Respondent also requests in its brief that I postpone the issuance of the instant decision, pending the Board's decision on two cases on which it allegedly held oral argument, *Chel LaCort*, Case 4–RN–1172 and *Road Sprinklers Filters Union No. 669*, Case 9–CB–7890, which according to Respondent involved whether *Retail Associates*, supra, should be modified. I reject this request and shall decide the instant matter under current law.

[6] I note that Respondent has raised arguments in its brief that were never raised at trial, concerning "unusual circumstances" it relied on to justify its withdrawal. Moreover, the arguments raised by Respondent at trial in this area, received little or no attention in its brief.

[7] This issue has not been decided on by the Board. See *Standard Roofing Co.*, 290 NLRB 193, 195 fn. 7 (1988).

agreement, and did provide some relief to Association members in this area.

Regarding the assertion that the Union insisted to impasse on a nonmandatory subject of bargaining, a most-favored-nations clause, this contention is equally without merit. Initially, Respondent has not even established that the Union bargained to impasse over the subject of a most-favored-nations clause, because most of the discussions over that subject took place after the alleged impasse was declared by the Association on July 21. Additionally, the bargaining over this clause was really an offshoot and part and parcel of the bargaining over the variable start time issue, over which the parties bargained substantially, with both sides making concessions and asserting their arguments.

More importantly, a most-favored-nations clause, contrary to Respondent's contention, is a mandatory subject of bargaining, and can be insisted on to impasse. *McAllister Bros.*, 312 NLRB 1121, 1129 (1993); *Control Services*, 303 NLRB 481, 482 (1991); *Dolly Madison Industries*, 182 NLRB 1037 (1970).

Accordingly, I conclude that Respondent has failed to demonstrate that the Union engaged in bad-faith bargaining, or that it unlawfully insisted to impasse on a nonmandatory subject of bargaining.

Perhaps recognizing that the instant record fell so far short of establishing its contentions in the above areas, Respondent made only a passing reference in its brief to these arguments that it had relied on at the hearing; and furnished no authority in support of their assertions that the withdrawal was justified because of an impasse and bad-faith bargaining by the Union. Instead Respondent raised for the first time in its brief, two additional contentions, which it claims establishes the requisite "unusual circumstances."

Relying on *Spun-Jee Corp.*, 171 NLRB 557 (1968), Respondent asserts that unusual circumstances have been established that proves that Respondent faced "dire economic circumstances such that the very existence of the employer as a viable business entity has ceased or is about to cease." This record contains absolutely no credible evidence, however, that Respondent faced such dire economic circumstances.

No records or financial statements were produced, nor even any testimony from any of Respondent's officials that such circumstances were in existence at the time of the withdrawal. Indeed, the only testimony in this record, even remotely relevant to this issue, is Muccio's testimony that Polsinelli stated several times at the Association's caucuses that Respondent could not survive or could not live with the Union's proposals. Such evidence is far from sufficient to meet the stringent and extreme test set forth in *Spun-Jee*, supra, to establish dire economic circumstances.

It is also noteworthy that Respondent made no contention at the time of its withdrawal either to the Union or to the Association that it was withdrawing because of dire economic circumstances or indeed because of the Union's bad-faith bargaining. See *Perella Glass*, 304 NLRB 489, 492 (1991). The only reason given in Respondent's letter of withdrawal to the Union and the Association was the existence of an impasse. I also conclude in agreement with the arguments of the General Counsel and the Charging Party that in fact Respondent withdrew, not because of the existence of an impasse, or indeed for any of the other reasons asserted by Respondent either at trial or in its brief, but simply because it became dissatisfied with the way the bargaining was progressing. Thus, on August 23, Polsinelli believed, correctly as it turned out, that certain members of the Association were about to "cave in" to the Union's demands, and end the strike. Therefore, Respondent sought to withdraw before an agreement was reached, that would obligate it to terms that it did not wish to be bound by. To permit such a withdrawal in such circumstances "would herald the demise of multi-employer bargaining," *Hi-Way Billboards,* 206 NLRB 22, 23 (1973).

Finally, Respondent in its brief makes still another argument for the first time, not raised at the hearing, nor referred to by Respondent in any of its conversations or communications with the Union or the Association. Respondent argues that when the multiemployer Association fails to fairly represent the interests of a class, withdrawal is justified. *NLRB v. Siebler Heating & Air Conditioning*, 563 F.2d 366 (8th Cir. 1977). Respondent further contends that because there were employers in the Association who wanted to settle the negotiations without obtaining the variable start times given by the Union to the Long Island Group, the holding in *Siebler*, supra, is applicable, and the withdrawal was lawful.

I note initially, however, that *Siebler* is a circuit court decision, which is contrary to current NLRB law, which I am bound to follow. Moreover, I also conclude that the facts here are substantially different form *Siebler*, supra, so that even in that circuit, Respondent's withdrawal would not be justified. It is significant that the *Siebler* opinion recognized the well-established principles that "dissatisfaction with the results of group bargaining does not justify an untimely withdrawal," and that "an employer cannot remain in a multiemployer unit as long as he believes it is to his advantage to do so and then withdraw when he concludes he can do better by himself." Id. at 371. The court then created an exception to these rules, when a particular class of employers, there a group of residential contractors, had only agreed to participate in multiemployer negotiations, if the majority (commercial contractors) agreed to work with them in achieving certain demands. The court found that the majority had not lived up to its commitment to represent the interests of the minority fairly, and made only a "feeble attempt to protect respondent's interests and threw in the towel at the first opportunity." Id. Therefore, the court found that the failure of the Association to fairly represent the interests of the minority, was an unusual circumstance justifying withdrawal. Under no conceivable rationale, can such a finding be made in the instant matter. Respondent was not a member of a particular class or minority of members, and or whose interests were not fairly represented. The Association here bargained vigorously in support of the position taken by Respondent, to insist on the Long Island contract, and in fact its members including Respondent, were subject to a strike for over 30 days. Indeed, to apply the holding of *Siebler* to this case, would permit any employer to withdraw from multiemployer bargaining, any time that it is dissatisfied with the way the bargaining was progressing, a result surely not contemplated by the court in *Siebler*, nor the Supreme Court in *Bonanno Linen*, supra.

Accordingly, based on the foregoing, I conclude that Respondent has violated Section 8(a)(1) and (5) of the Act by withdrawing from the Association and refusing to abide by

the terms of the agreement reached between the Association and the Union.

B. *The Alleged Bypassing of the Union*

I have found above that in mid-August, Respondent's owner, Tom Polsinelli, approached striking employees on the picket line, and offered them a salary of $23 per hour plus U.S. Healthcare benefits, if they would abandon the strike and their support of the Union and return to work. Such conduct clearly constitutes an unlawful attempt by Respondent to bypass the Union and bargain directly with employees, in violation of Section 8(a)(1) and (5) of the Act. *Gloversville Embossing Corp.*, 297 NLRB 182, 187–190 (1989); *Madison Industries*, 290 NLRB 1226, 1229 (1988). I so find.

The complaint also alleges, and the General Counsel contends that Respondent engaged in a similar violation of Section 8(a)(1) and (5) of the Act by its September 14 letter to employees, which according to the General Counsel made offers of employment directly to employees, bypassing the Union. In view of the fact, however, that I have found above that Respondent's prior conduct established direct bargaining violations, a finding that the September 14 letter constituted another similar violation would be duplicative and cumulative and would not add to the remedy that would be recommended. Therefore, I do not deem it necessary to, and I shall not decide whether this letter also constitutes unlawful direct bargaining.

C. *The Alleged Discharge and/or Refusal to Reinstate Employees*

On September 2, all eight of Respondent's employees reported to work, seeking to return to their jobs, because the strike was over. John Polsinelli replied on behalf of Respondent, that he didn't have work for the men, "I don't hire Union drivers," and "there is no Union here any more."

The General Counsel argues, and I agree, that these statements constituted a discharge of employees in violation of Section 8(a)(1) and (3) of the Act. A finding of discharge does not depend on the use of formal words of firing. It is sufficient if the employer's words or conduct would reasonably lead employees to believe that their tenure had been terminated. *Romar Refuse Removal*, 314 NLRB 658 (1994); *Ridgeway Trucking Co.*, 243 NLRB 1048, 1049 (1979). Here, Respondent's actions in telling the employees that it doesn't hire union drivers, and there is no union here anymore, in the context of denying them the opportunity to return to work is sufficient in my view to reasonably lead employees to believe that they had been discharged.

Because the statements of Polsinelli strongly indicate that the reason for its discharge of the employees was their union and/or strike activities, and Respondent adduced no evidence of any other reason for terminating them, I find that their discharges were violative of Section 8(a)(1) and (3) of the Act.

Even absent a finding of a discharge on September 2, Respondent's conduct in not reinstating the strikers at that time was violative of the Act. Although Respondent may lawfully hire permanent replacements to replace economic strikers, it is Respondent's burden to establish that it hired permanent replacements prior to the request of the strikers to return to work. Here, while the record tends to show that Respondent may have hired some employees, it does not establish that Respondent hired permanent replacements at any time, much less before the employees sought to return to work. Therefore, it has violated the Act by refusing to reinstate its employees, even absent a finding that they were discharged on September 2.

I also conclude that Respondent's conduct on September 2, whether it be characterized as a discharge or a refusal to reinstate economic strikers, is sufficient to convert the strike to an unfair labor practice strike. *Gloversville Embossing*, supra.

Additionally, I conclude that Respondent's conduct of withdrawing from the Association, and in refusing to abide by the terms of the memorandum of agreement between the Association and the Union, was another reason to also convert the economic strike to an unfair labor practice strike. *Charles D. Bonanno Linen Service*, 268 NLRB 902 fn. 2 (1984); *Harding Glass Industries*, 248 NLRB 902 fn. 2 (1980), enfd. 672 F.2d 1330 (10th Cir. 1982).

On September 7, the employees made another attempt to return to work. On this occasion, John Polsinelli told them that he didn't have any work for them, "I don't hire union drivers, you don't work here for us," and "there are no union members." These statements, particularly the comment "you don't work here for us," are an even clearer indication of discharge than Polsinelli's September 2 remarks. Thus, I find that if no discharge is found to have occurred on September 2, that the employees were discharged in violation of Section 8(a)(1) and (3) on September 7.

Moreover, as in the case of the September 2 refusal to reinstate, the September 7 refusal to employ the returning strikers is violative of the Act, even absent a finding of discharge. Thus, I have found that the strike was converted to an unfair labor practice strike, by the prior (September 2) refusal to employ, as well as by Respondent's withdrawal from the Association and refusal to abide by the terms of the agreement reached between the Union and the Association.[8] Therefore, Respondent's refusal to reinstate unfair labor practice strikers is violative of Section 8(a)(1) and (3) of the Act, regardless of whether its conduct on September 7 is considered to be a discharge.

Finally, as was the case with the September 2 refusal to reinstate, Respondent has not established that it hired permanent replacements prior to the request to return by employees on September 7. Thus, even if the employees were still economic strikers on September 7, Respondent has violated the Act by not reinstating them at that time.

The General Counsel also contends that Respondent committed independent violations of Section 8(a)(1) of the Act, by informing its employees on September 2 and 7 that the reason for their discharges was because they joined, supported, or assisted the Union. I agree and so find. *Gloversville Embossing*, supra.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

[8] It is noted that the agreement provides for a return to work of all strikers. Thus, the refusal to reinstate the strikers is violative of Sec. 8(a)(1) and (5) as well as of Sec. 8(a)(3) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time chauffeurs, employed by members of the New York City Concrete Producers, Inc., including Respondent's employees, excluding guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material, the Union has been, and is, the exclusive representative of the employees in the unit described above.

5. Respondent has violated Section 8(a)(1) and (5) of the Act by withdrawing from Association bargaining on August 26, 1993, refusing to honor and abide by the agreement reached between the Union and the Association on August 31, 1993, including the requirement that it reinstate all striking employees, and by bypassing the Union and engaging in direct bargaining with its employees.

6. Respondent has violated Section 8(a)(1) and (3) of the Act by discharging and/or refusing to reinstate its employees who requested reinstatement after the termination of the strike, on September 2 and 7, 1993.

7. Respondent has violated Section 8(a)(1) of the Act by informing the employees that the reason for their discharge was their activities on behalf of or in support of the Union.

8. The strike of Respondent's employees that began July 21, 1993, was prolonged by and converted to an unfair labor practice strike by Respondent's unfair labor practices as described above.

9. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order that it cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Because Respondent has failed to agree to or to implement the terms of the memorandum of agreement between the Association and the Union, I shall recommend that it notify the Union in writing that it will honor and abide by the terms of that agreement, and to make whole all employees, for any losses of wages or benefits suffered by reason of Respondent's failure to implement the agreement, in the manner set forth in *Ogle Protection, Inc.*, 183 NLRB 682 (1970), and *Kraft Plumbing & Heating Co.*, 252 NLRB 891 (1984); with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent will also be ordered to make all contributions to the Union's benefit funds as required under the terms of the agreement, with the question of interest on these sums to be determined under the standards set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

I have also found that Respondent violated Section 8(a)(1) and (3) of the Act by discharging and/or refusing to reinstate strikers who sought to return to work. Respondent appears to contend that its September 14 letter to the strikers, constituted a valid offer of reinstatement that terminates or at least reduces its backpay obligation to the employees. I disagree.

The September 14 letter offers the employees their jobs back, but only at the terms of the Association's last offer. The employees were entitled to be reinstated under the terms of the agreement reached between the Association and the Union to which Respondent was bound. Therefore, Respondent's offer of reinstatement was invalid for any purpose, and the employees were under no obligation to respond to such an offer. Therefore, the backpay of the employees is not terminated by, nor reduced by their failure to accept Respondent's invalid offer. *Chicago Tribune Co.*, 303 NLRB 682, 694 (1991), enf. denied on other grounds 965 F.2d 244 (7th Cir. 1992); *Harding Glass Industries*, 248 NLRB 902, 907 (1980), enfd. 672 F.2d 1330, 1339 (10th Cir. 1982).

Accordingly, I shall recommend that Respondent be ordered to reinstate the employees to their former positions of employment, and make them whole for any losses suffered by them, computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as set forth in *New Horizons*, supra.

[Recommended Order omitted from publication.]

Saundra R. Ratner, Esq., for the General Counsel.
Lulgi P. DeMaio, Esq. (Crocco and DeMaio), of New York, New York, for the Respondent.
Bruce S. Levine, Esq. (Friedman and Levine), of New York, New York, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. On September 19, 1994, I issued a decision and recommended order in the above-entitled case, finding inter alia, that Atlas Transit Mix Corp. (Respondent) violated Section 8(a)(1), (3), and (5) of the Act, by withdrawing from Association bargaining on August 26, 1993,[1] refusing to abide by the terms of the agreement reached between the Association and Building and Material Teamsters Local 282 International Brotherhood of Teamsters, AFL–CIO (the Union or Local 282), and by discharging and or refusing to reinstate its employees who requested reinstatement.

Thereafter, while exceptions were pending before the Board, Respondent filed a motion to reopen the record, which resulted in an order from the Board remanding the proceeding to me to reopen the record to receive further evidence and address the contentions made by Respondent in its motion.

Pursuant thereto, the trial with respect to these issues was held before me in New York, New York, on March 11, 1996.

Briefs have been filed and have been carefully considered. Based on the entire record, including my observations of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. FACTS

The essence of Respondent's assertion that it was not properly represented in negotiations and, therefore, unusual circumstances warranted its untimely withdrawal from negotiations, was the various indictments, guilty pleas, consent

[1] All dates hereinafter referred are in 1993 unless otherwise indicated.

judgments, and civil actions against several officers and officials of the Union and the Union itself, as well as one member of the Association's bargaining committee.

In that regard Respondent introduced into the record several documents, which were referred to in its motion to reopen. In Case 92–1344 the U.S. Attorney for the Eastern District secured indictments and superseding indictments against Robert Sasso, Michael Carbone, Michael Bourgal, John Probeyahn, and Joseph Matarazzo all of whom were or have been officers and employees of the Union.[2]

The superseding indictment alleged that the Gambino crime family and the above-named officials of the Union received large sums of illegally obtained moneys by virtue of a long-term and corrupt relationship between the highest ranking members of both organizations. The indictment further alleges that Sasso and Carbone were associates of the Gambino crime family, as well as officers of the Union. No such allegation was made concerning Bourgal or Probeyahn.

The indictment accused the officials of the Union of the following conduct:

> The defendants abused their official positions within Local 282 by, among other things, demanding and collecting unlawful cash payoffs from representatives of companies falling under the jurisdiction of Local 282. In exchange for these monies, the defendants provided the companies various benefits including (1) the permission to perform work without entering into Agreements with Local 282 and without experiencing labor unrest; and (2) the lax enforcement and non-enforcement of the Agreements.

The indictment further alleges a number of specific acts of labor payoffs, racketeering, extortion, and conspiracy involving a number of different employers. One of the companies named was Quadrozzi Concrete Corp., which was a member of the Association, and whose president, John Quadrozzi, was the president of the Association and Chairman of the bargaining committee.

The indictment alleged as follows:

> 45. In or about July and August of 1986, both dates being approximate and inclusive, the defendant ROBERT SASSO, an officer and employee of Local 282, together with others, did knowingly, willingly and unlawfully request, demand, receive and accept, more than $1,000 from a person acting in the interest of Quadrozzi Concrete Corp. and John P. Picone, Inc., whose employees were employed in an industry affecting commerce, were represented by Local 282 and would have been admitted to membership by Local 282, in violation of Title 29, United States Code, Section 186(b)(1) and (d).

The indictment further alleges, in pertinent part:

> 67. In or about and between the late 1970's and 1991, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants ROBERT SASSO, MICHAEL CARBONE, MICHAEL BOURGAL, JOHN PROBEYAHN and JOSEPH MATARAZZO, together with others, knowingly, willingly and unlawfully conspired to commit an offense against the United States, in violation of Title 29, United States Code, Section 186(b)(1), to wit: to request, demand, receive and accept and agree to receive and accept, more than $1,000 from persons acting in the interest of demolition companies and contractors, whose employees were employed in industries affecting commerce and were represented and would have been admitted to membership by Local 282.

The record reflects that in March 1994 Sasso pleaded guilty to count one of the superseding indictment which alleges that he conspired to conduct the affairs of the Union through a pattern of racketeering. As part of the plea, Sasso admitted to committing two specific acts of racketeering, namely requesting, demanding and receiving more than $1000 from a person acting in the interest of E. W. Howell, Inc. in 1983 or 1984, and together with Carbone engaging in the same conduct with respect to a person acting in the interest of E. W. Howell, Inc. in 1984 and 1985.

In September 1993, Carbone also pled guilty to the same count as did Sasso, and specifically admitted demanding receiving and accepting more than $1000 from a person acting in the interest of E. W. Howell, Inc., in December 1989, and from a person acting in the interest of Point Ironworks between 1987 and August 1988.

Similarly, in September and October 1993, Bourgal and Probeyahn pled guilty to the same count of the superseding indictment. In that connection, Bourgal admitted that he demanded, received, and accepted more than $1000 from a person acting in the interest of Meadow Concrete Corp. on December 17, 1986, and on December 21, 1987, and Probeyahn admitted engaging in the same conduct on December 1989—January and December 1990—January 1991 with respect to a person acting in the interest of I. M. Konigsberg & Son.

On June 11, 1992, a indictment was secured against John Quadrozzi in Case No. 92 C 493 in Southern District of New York, which alleges that Quadrozzi was guilty of criminal contempt concerning certain activities in regard to the Luchese crime family. It also alleged an illegal labor conspiracy, which involve Quadrozzi's actions with respect to 10 companies of which he is the chairman and president, including Quadrozzi Concrete Co., Inc. In thatconnection the indictment alleges as follows:

> THE ILLEGAL LABOR CONSPIRACY
>
> 2. Prior to and including in or about October, 1991, in the Southern District of New York and elsewhere, JOHN QUADROZZI, the defendant, and others known and unknown to the Grand Jury, unlawfully, willfully and knowingly did conspire, combine, confederate and agree together and with each other to commit offenses against the United States.
>
> 3. It was an object of the conspiracy that JOHN QUADROZZI, the defendant, being an employer, to wit, the Quadrozzi Companies, and others known and

[2] According to the superseding indictment, Sasso was president of the Union and resigned in April 1992. Carbone and Matarozzo were secretary-treasurer and business agent, respectively, of Respondent, and they resigned in December 1991 and September 1989, respectively. Bourgal and Probeyahn were president and secretary-treasurer, respectively, of the Union at the time of the superseding indictment.

> unknown to the Grand Jury, unlawfully, willfully and knowingly, did pay, lend, deliver and agree to pay, lend and deliver money and things of value, to wit, in excess of $100,000, to labor organizations and officers and employees thereof, which Labor organizations represented, sought to represent, and would have admitted to membership the employees of the Quadrozzi Companies, who were employed in an industry affecting commerce.

The indictment further alleges overt acts that were committed in the Southern District of New York. These acts accuse Quadrozzi of paying $2500 in December 1990, $25,000 in 1984 and 1985, and $15,000 in 1978 and 1979 to "officials of a Local Labor Union in New York City." The name of the union is not further identified in the indictments.[3]

The record tends to show that on November 18, 1993, Quadrozzi withdrew his plea of not guilty to the indictment, and entered a plea of guilty which was accepted by the court. Sentencing was set for March 10, 1994.

Further, in Case No. 94-CV-2919, the U.S. Attorney for Eastern District filed a civil action against Local 282, Sasso, Carbone, Bourgal, Probeyahn, and Matarazzo on June 21, 1994. This action brought under RICO, sought to enjoin the Union and the individuals from engaging in unlawful racketeering activity, and from associating with members or associates of the Gambino crime family, as well as the appointment of a trustee under the control of the court to control and direct the operations of the Union.

The complaint alleges that the Union has for more than 25 years been infiltrated, controlled, corrupted, and run by members of the "Gambino Organized Crime Family." It further alleges a number of specific acts of extortion, unlawful payments, and racketeering committed by the above individuals, most of which appears to have been the same conduct alleged in the prior criminal action described above, which resulted in the guilty pleas as also detailed, infra. This complaint includes the allegation, also included in the prior criminal case, that in July or August 1986, that Sasso requested, demanded and received more than $1000 from a person acting in interest of Quadrozzi Concrete Corp. and John P. Picone, Inc. whose employees were represented by Local 282.

On March 22, 1995, a consent judgment was executed based on the above-described civil action, signed by the U.S. attorney, the attorney for the Union, the General Counsel for the International Brotherhood of Teamsters (IBT), and by Johnnie Brown, who had previously been appointed by the IBT as a trustee to oversee the operations of Local 282.

The document essentially provides for the appointment of a corruption officer to oversee along with the IBT trustee, the affairs of Local 282 in order to "ensure that any traces of racketeering, corruption and organized crime influence are eradicated."

Respondent also introduced into the record a number of complaints filed by the trustees of the Union's Welfare, Pension, and Annuity Funds, against various defendants who were members of the Association bargaining committee or companies affiliated with the companies which were filed in 1994, 1995, and 1996. These actions which were all filed in Federal District Court alleged various amounts of nonpayment into the Funds of the Union, and or the failure of certain companies to post a surety bond as required under the collective-bargaining agreement.

Respondent's attorney asserts that his search of the cases filed in Eastern District by Local 282 or the trustees of the Union against members of the negotiating committee, also revealed six other cases, the files of which he was unable to obtain. They included cases filed against Quadrozzi Concrete Corp. in 1992 and 1990, Quality Concrete in 1993, and Scaccia Concrete in 1992.

Additionally, Respondent also introduced one complaint filed in 1989 by the trustees of the Union, against a number of companies alleging a failure to post a surety bond. Included in this complaint was Valente Industries Corp. and City Ready Mix Co., both members of the negotiating committee of the Association.

Respondent called as its sole witness in the remand proceeding, Thomas Polsinelli, Respondent's vice president. He testified that prior to or during the negotiations in 1993, he was not aware of the pendency of any indictments against Sasso, Bourgal, Carbone, Probeyahn, or Quadrozzi, and that he did not become so aware until he read a newspaper article in the Nassau Herald in March 1995. According to Polsinelli, after reading this article, he asked his attorney to obtain the indictments referred to therein. He further testified that after reading the indictments supplied by his attorney, that had he known about these indictments prior to the start of negotiations in 1993, he would not have authorized the Association to bargain for him with the Union.

Respondent did not introduce into the record the newspaper article that Polsinelli referred to in his testimony. However, a xerox copy of the article was submitted by Respondent attached to its motion to reopen the record. The document submitted, although quite difficult to read appears to be pages from the Nassau Herald paper of March 16–22, 1995, which reflect two articles, one entitled "Concrete executive sings to FBI" and the other "Man charged with extortion." Both articles appear to make reference to an indictment of Frank Manzo and other alleged members of the Luchese crime family on February 17, 1995, for extortion of Quadrozzi. According to the articles, the indictment alleged that John Quadrozzi made more than 180 cash payments to the defendants ranging from $10,000 to $20,000 per month, since 1978. The article also reflects that Quadrozzi cooperated with the FBI and "secretly pleaded guilty to contempt charges and making illegal payoffs to Union officials." The articles further assert that the payments were made to the defendants of $12,000 a month to insure Quadrozzi's safety, and for labor peace at construction sites around the city. It is noted that the articles make no reference to payments made to Local 282 or to any Union for that matter, or that a purpose of these payments was to obtain relief from any collective-bargaining agreement between any of Quadrozzi's companies or any labor organization.

It is obvious that Polsinelli never saw the indictment referred to the March 1995 article. While he asserts that he did read the indictments against Quadrozzi and the union officials, which were introduced here, Polsinelli admitted that other than Quadrozzi, none of the other companies mentioned therein were members of the Association. Moreover,

[3] I note in this regard that Local 282's office is located in Lake Success, New York, which is not in New York City.

he asserted that all these other companies were "outside the concrete industry."

Polsinelli also furnished testimony concerning the negotiations between the Association and the Union. The members of the Association's negotiation committee were in addition to Polsinelli himself, John Quadrozzi the chairman, Walter Charles from Quality Concrete Corp., Tony Scottia from City Ready Mix Co., and Joe Ferrara a representative of Ferrara Bros. Building Materials Co., Vinnie—from Scara-Mix Inc., and a representative from Valente Industries.

The chief spokesperson for the Association was Alex Miuccio, the Association's attorney, who did most of the negotiations on behalf of the Association.

When the negotiations commenced, Bourgal and Probeyahn were the chief negotiators for the Union. Sasso who had been the union president and been the main spokesperson for the Union had previously been removed from office. Polsinelli testified that he was aware that Sasso had been removed from office sometime in 1992, but he did not know the reason this action was taken.

After several negotiation meetings, sometime in June, apparently due to the superseding indictments filed against them, Bourgal and Probeyahn were removed from office and no longer appeared at negotiations. A trustee, Johnnie Brown was appointed by the International to oversee the local at that time, and he was present at some subsequent sessions.

Additionally two new union officers, plus its attorneys were present who conducted the negotiations on behalf of the Union thereafter.

According to Polsinelli, he did not know of the indictments against Bourgal or Probeyahn, and did not know why they were no longer representing the Union at negotiations. No one from the Association asked why there had been such a change, and no one from the union volunteered any explanation.

However, Polsinelli did concede that he was aware that the prior officers had been removed, and that he believed that it was because of some legal problem. Polsinelli also testified, "[T]hat was standard operating kind of procedure that, you know, Union officials be indicted, removed and new guys going in. That wasn't abnormal for the time."

Polsinelli also admitted that the negotiating committee discussed the absence of the prior officials and the presence of new negotiators among themselves. The committee members wondered whether or not they would have to start bargaining from scratch, or whether the new negotiation team would abide by what had previously been agreed on by their predecessors Polsinelli did not recall the resolution of this issue. Some members speculated that maybe the committee would be able to get a better deal from the new group, since they do not have the experience of Bourgal and Probeyahn. Indeed, Polsinelli himself knew that one of the new union officials, Neal Madonna has recently came off a truck, and Polsinelli felt that "maybe we had an opportunity to get some concessions." The committee also discussed the possibility of a connection between Sasso's prior removal, and the removal of Bourgal and Probeyahn, and the comment was made that their removal was not a big shock since they had worked under Sasso for 25 years. It was also stated by different members of management's team, that the next step from that "chair" (referring to the Union's head negotiator) is jail; that anybody who sat at the head of the table negotiating for the Union, the next stop was possible jail, and that they (the former union officials) "had to pick out their furniture in the cell at Sing Sing."

Sometime during the negotiations, the members of the negotiation committee were informed by Walter Charles of Quality Concrete that he had hired Sasso in an executive position at his company. He also stated that Sasso would be present at negotiation committee meetings as a representative of Quality, and would be helping to advise the Association in its negotiations with the Union. Neither Polsinelli nor anyone else from the Association made any objection to Sasso appearing as a participant at the committee's meetings.

Thereafter, Sasso was present at a number of meetings held by the members of the negotiating committee held at various restaurants, wherein Sasso advised the committee on strategy in dealing with the Union. Sasso was not present at any negotiation sessions with the Union, since he was not permitted in the building (the union office) where negotiations took place.

Polsinelli also testified that Quadrozzi was not only the president of the Association, and chairman of the negotiating committee, but also the most senior and experienced member, and as such had "quite a bit of influence over most of the other six members." However, Polsinelli conceded that Quadrozzi said very little at the negotiations, since Miuccio did most of the talking.

Further, at the caucuses and meetings held by the committee, often with Sasso present, all members including Polsinelli were given full opportunity to speak. When votes were taken on disputed issues, a majority of the seven members would prevail, with Quadrozzi's vote having no more significance than Polsinelli's. However, Polsinelli also asserts that larger companies such as Quadrozzi and several other members would have more clout than smaller members such as "Atlas." In that connection, Atlas had the smallest number of employees of any of the members. The reason that the larger members had "more clout," according to Polsinelli, was that there was always a fear that a company would break ranks and sign a "me to" contract. Thus, if a large company took a particular position, the smaller companies would be likely to go along states Polsinelli, for fear that the large company might sign a "me to" contract with the Union if their position is not adopted by the Association.

With respect to the particulars of the instant negotiations, Polsinelli asserts that Respondent had a problem with making fringe benefit payments to the Union, and that as a small company, it needed some relief in this area. Polsinelli brought up his concerns at committee meetings, and he was told to do some research on preparing a substitute health plan, such as an HMO. Subsequently, Polsinelli himself, brought up the issue at the negotiations with Probeyahn. Probeyahn informed Polsinelli that the Union was looking into HMO's but were not able to do it yet, since they could not sell it to the men because the men to go to their own doctors, and that the fund also covers retirees. After this exchange, at a subsequent committee meeting, Polsinelli brought up the subject again, received no support from any other member, and the issue was dropped without a vote being taken.

Polsinelli also proposed that an alternate pension plan be created for new employees. While some members of the committee agreed that pension costs were high, because of

possible problems with unfunded liability, the committee decided that the Union would never go for such a proposal and it was not a strike issue, so the suggestion was made to the Union during negotiations.

Polsinelli also felt that the employees did not need an annuity fund, and made a proposal to the committee with respect to this fund. The other members stated that there were shop stewards at negotiations with a lot of money in the Annuity Fund, and any proposal to curtail this fund "would not fly." Thus, once again the matter was dropped without being presented to the Union.

The Association did decide however, to make a number of proposals to the Union for concessions, on several language issues, removal of the successorship clause, reductions in sick days and holidays, and change in the start-time clause in the prior contract. The Association also proposed no wage increase in the first year and raises of 1 and 2 percent in the second and third year of the contract.

According to Polsinelli, the Association submitted its final offer to the Union which was rejected by the employees, and the strike began, before the Association became aware of the Long Island Association's Agreement with the Union. Polsinelli recalls that it was sometime in late July or early August, after the commencement of the strike that the Long Island Agreement became known and became a significant issue during the negotiations.

In that regard, Miuccio informed the committee of this agreement, and that he believed that since there was a most-favored-nations clause in the prior contract, the Union would be compelled to give the same concession on start time to the Association that it agreed to with the Long Island Group. When Miuccio took that position during negotiations, however, the Union countered by proposing that the most favored nations clause be amended to exclude the Long Island contract.

At that point, there was a caucus. During the caucus, Polsinelli asserted that it was unbelievable that the Association was not only failing to obtain any concessions, but were not even able to get what the Long Island guys got. He stated that his plant is located near the Long Island border and that his competitors in Long Island would be able to start at 6 a.m. without paying time and a half. There was considerable discussion about these developments. Two of the members, Valente and Scara-Mix which were located in the Bronx and Staten Island were not concerned about the issue, since they were not affected by the Long Island contract.

Quality, Ferrara, Quadrozzi, and City were large companies, and according to Polsinelli were not significantly impacted by the start time issue, since the Long Island companies generally cannot compete with these firms. However, some of the representatives from these firms were very upset about the Union's retreat on the most favored nations clause, as a bad precedent and expressed strong disapproval of this position. Miuccio also was very upset about the Union's position on the most-favored-nations clause, as well as its failing to agree to the same concession on start time that it gave to the Long Island Association.

Thus, according to Polsinelli, his company being the only one of small size and close to the border of Long Island, was the only member of the committee that was very upset about the start time issue, as well as the Union's position on the most-favored-nation clause.[4] In any event the Association held firm at that meeting although the strike was beginning to take its toll on some members.

About a week later, August 23, another negotiation meeting produced no agreement. However, during the Association's caucus, Tony Scottia the representative from City Ready Mix, which is a large company located just down the block from Respondent, told the committee that it was not worth it to stay on strike for an extra hour in the morning, and that he was going to sign a "me too" contract with the Union. As a result of this statement by Scottia, Polsinelli believed that the Association was going to "cave in," that the strike was hurting several of its members, and that there would be an agreement without the start-time concession that Respondent needed. Therefore, as noted in my prior decision, shortly thereafter, Respondent withdrew from the Association, and an agreement was subsequently reached between the parties on August 31, which was ratified by the Union on September 1. As also noted in my prior decision, the agreement did provide some relief on the start-time issue, but not the identical provision that was included in the Long Island Agreement.

II. ANALYSIS

Respondent's argument that "unusual circumstances" existed at the time of its withdrawal from negotiations is summed up in the following sentence from Respondent's brief. "It is virtually uncontested that a self-generated bias and prejudice existed at the time of and during the negotiations at issue here insofar as a majority of the negotiators both on the union side and the management side were granting and receiving preferential treatment under the contract being negotiated."

However, a close examination of the documents and other evidence submitted by Respondent in support of its assertions in this regard, reveal that Respondent has fallen far short of establishing the above contentions.

Respondent contends that in the case of Sasso, Probeyahn, Bourgal, and Quadrozzi that these facts are res judicata in view of their guilty pleas to the indictments against them. I disagree. As to Sasso, Bourgal, and Probeyahn the superseding indictment alleges that they demanded and collected cash payoffs from representatives of companies under Local 282's jurisdiction, in exchange for various benefits including the lax enforcement and nonenforcement of the collective-bargaining agreements. The indictment also alleges a large number of specific acts by the three union officials of alleged racketeering, extortion, and conspiracy involving various employers, including an allegation that in 1986, Sasso requested, demanded, and accepted more than $1000 from a person acting in the interest of Quadrozzi Concrete Corp. and John Picone, Inc.

However, according to the testimony of Polsinelli and not contradicted by any other evidence, other than Quadrozzi, none of the other companies referred to in the indictment were members of the Association. Clearly no other member of the negotiating committee was alleged to have been involved in any of the unlawful conduct engaged in by Sasso,

[4] In this connection, Polsinelli testified that Quadrozzi said nothing at the caucus about either of these issues.

Bourgal, or Probeyahn. More importantly an indictment is only an allegation, and is not proof of any unlawful activity.

While Sasso did plead guilty to parts of the indictment, the plea included only admissions to two specific acts of demanding and receivng payments from representatives of two companies in 1983–1985, and did not contain any admission concerning the alleged payoff from Quadrozzi in 1986.

Similarly, while Bourgal and Probeyahn also pled guilty to part of the indictment, the only specific acts admitted by them involved the demanding and accepting money from two employers at various times between 1986 and January 1991, none of whom were members of the Association, much less members of the negotiating committee.

Thus, in my view the only res judicata effect of these documents can be found in the admissions by these three former union officials that they demanded and received moneys from several employers, none of whom were members of the Association or the Association's negotiating committee, and which occurred from 2-1/2 to 7 years before Respondent withdrew from Association bargaining.

Respondent also asserts that Quadrozzi's guilty plea also is res judicata in establishing its contention that Quadrozzi was receiving preferential treatment under the contract being negotiated. However, the indictment against Quadrozzi, secured in June 1992, alleges that he and the Quadrozzi companies prior to and including October 1991, paid in excess of $100,000 to labor organizations and officers of labor organizations which represented or sought to represent employees of the Quadrozzi companies.

While it appears that Quadrozzi withdrew his not guilty plea to this indictment, the record does not reflect to what specific acts he pled guilty. Significantly, even assuming that he pled guilty to each and every allegation in the indictment, no connection between his indictment and Local 282 has been established by Respondent.

I note in this connection that this indictment makes reference to Quadrozzi's conduct with regard to the Luchese crime family, unlike the indictments against the Local 282 officials which allegedly involved the Gambino crime family. Moreover, none of the specific acts alleged in the indictment against Quadrozzi make reference to the 1986 alleged incident involving Sasso and Quadrozzi which was contained in the indictments against the Local 282 representatives. Finally, the overt acts alleged in the indictment against Quadrozzi refer to acts committed in the Southern District of New York and refer to payments made to officials of a "local labor Union in New York City." Since Local 282's offices are located in Lake Success, New York, which is not in New York City, the above evidence strongly suggests that this indictment against Quadrozzi did not involve any conduct with officials of Local 282. While this indictment does not name the Union involved, nor make absolutely clear that Local 282 officials were not parties to the unlawful acts, I note that it is Respondent's burden to establish that Quadrozzi's indictment and guilty plea relate to activities with Local 282 representatives. Clearly it has not met that burden, and I conclude that res judicata effect can only be given to Quadrozzi having admitted to making unlawful payments prior to October 1991 to officials of a labor organization.

Thus, in sum, Respondent has not established that Local 282 committed any unlawful conduct with respect to any members of the Association at all, much less any members of the Association bargaining committee. Nor has it established that Quadrozzi or any other committee member engaged in any unlawful activities with respect to Local 282 officials.

Respondent also relies on the Union's consent decree that it signed with the U.S. attorney as a result of the civil action filed by the Government. However, it is questionable whether that decree raises a presumption of an admission by the Union, particularly since it contains a nonadmission clause. However, it is noted that the only alleged act of "racketeering" referred to in the underlying civil action which formed the basis for the decree that relates to any member of the Association or the bargaining committee of the Association, is the single incident in 1986, when Sasso allegedly demanded and accepted more than $1000 from a "person acting in the interest of Quadrozzi." So at best, Respondent could reasonably argue that an admission of such conduct has been established. It must be noted though, that even that admission does not necessarily implicate Quadrozzi personally, because it is not clear whether Quadrozzi himself was aware of these payments that were made in 1986.

In any event, such an admission is hardly sufficient to establish the existence of the alleged implicit understanding, asserted by Respondent, that the parties were bargaining at the time, while being aware that any deal that was made between the parties would be selectively enforced by the Union only against those members who did not make payoffs to the Union.

Thus, this alleged incident took place in 1986, and indeed none of the incidents referred to in the indictments or the civil suit, occurred within 2 years of the instant negotiations. Moreover, Sasso, Respondents former president had been removed from office prior to negotiations, and after a few meetings, the same fate befell Bourgal and Probeyahn. Thus, the bulk of the negotiations were conducted by union officials untainted by any unlawful allegations, and under the jurisdiction of Johnnie Brown, a trustee who had already been appointed by the IBT to oversee the Local's affairs and to root out unlawful activities. I, therefore, find it highly unlikely that any implicit understanding would have been in place to selectively enforce the contract, in view of the above circumstances. Indeed, while it is true that Quadrozzi was under indictment at the time for alleged unlawful conduct (albeit not shown to have been in connection with Local 282 officials), I conclude that this fact would make it less likely that he would engage in any unlawful conduct with respect to Local 282 involving the instant negotiations. Thus, knowing that he was already under indictment by the Government, it seems to me that Quadrozzi would be most careful about engaging in any additional unlawful conduct. Indeed under Polsinelli's own testimony, Quadrozzi said very little during the instant negotiations or during caucuses of the management committee, thus apparently wishing to keep a low profile during these sessions. I, therefore, find it dubious that Quadrozzi would be party to any unlawful understanding with the Union. Clearly Respondent has not come close to proving the existence of any implicit agreement to selectively enforce the contract between any of the Union's negotiators and Quadrozzi or any other of the members of the negotiating committee.

Respondent's reliance on the evidence that the Union or its Funds filed a number of actions in Federal court against certain members of the Association in 1994, 1995, and 1996 is misplaced. Respondent's contention that these actions, which took place only after the intervention of the Federal Government, proves that these companies previously has been permitted to violate the contract because of unlawful payments made to union officials is unpersuasive. Respondent adduced no evidence that any of these firms had ever been delinquent in meeting their contractual obligations prior to the actions filed against them, or that even if they had, the matters were not disposed of in some other fashion, such as arbitration, or whether any prior delinquencies were inadvertent or intentional. Moreover, it is noted that Respondent itself conceded that the Union had in fact filed at least one action against Quadrozzi in 1990, before any government action against Quadrozzi or the Union.

Respondent also argues that the retention of Sasso as a "consultant" by Quality and the Association constitutes an "unusual circumstance," particularly where Sasso was negotiating on the union side with the very accomplices he employed (Probeyahn and Bourgal) in practicing his extortion and the Employer side with the victims of his extortion. However, as noted above, the factual underpinnings for Respondent's assertion with regard to alleged extortion by the union officials has not been established, as Respondent has not proved that Sasso or any union official has ever extorted any money from any members of the Association. Moreover, while the evidence discloses that Sasso was employed by Quality, a member of the Association and assisted the Asociation in bargaining with his former subordinates, I do not find this circumstance to be an unusual circumstance warranting Respondent's withdrawal from the Association. In fact, I conclude that Polsinelli's reaction to these facts, as well as to the subsequent removal of Probeyahn and Bourgal from the Union's negotiation team, is most instructive in evaluating Polsinelli's self-serving and unconvincing testimony that he would not have authorized the Association to represent him had he known about the indictments and actions against the Union and its officials. Thus Polsinelli admitted that when he was informed that Sasso had been hired by Quality as an employee and would be advising the Association in its negotiations with the Union, that neither he nor any other member of the Association committee made any objection. Additionally, when Bourgal and Probeyahn were removed from negotiations and from their union positions shortly after negotiations began, Polsinelli did not inquire as to why this action was taken. Nor did Polsinelli make any attempts to withdraw from the Association after both of these events came to his attention. His assertion that he had no definite knowledge of any indictments is not convincing. He conceded that he was aware that the officials had been removed because of some legal problem, and "that was standard operating procedure that, you know, union officials be *indicted* removed and new guys going in. That wasn't abnormal for the time." (Emphasis added.) Polsinelli also admitted that the members of the Association committee discussed the absence of the prior officials, and speculated that all three former union officials would wind up in jail.

Accordingly, based on the above, I conclude that at the time of the change of union representatives Polsinelli was virtually convinced that Sasso, Probeyahn, and Bourgal had been removed from office because of a criminal proceeding against them, and that they may very well end up in prison. However, not only did Polsinelli make no attempt to confirm this belief that he held, he also did not attempt to withdraw from Association bargaining at that time. Rather, he as well as the other members of the Association sought to take advantage of these developments. In that connection, Polsinelli was perfectly willing to utilize Sasso's presumed expertise in dealing with the Union, or even his presumed connection with his prior subordinates, where it might have been to his or the Association's advantage. Similarly, Polsinelli admitted that when Bourgal and Probeyahn were removed, both he and other members of the committee felt that the Association would be able to get a better deal from the relatively inexperienced new negotiators selected by the Union. Therefore, it is clear that Polsinelli had no concerns about any alleged unlawful activities committed by Sasso, Bourgal, or Probeyahn, and in fact was quite pleased about their removal from union office and Sasso's employment with Quality, since these facts might result in obtaining a better contract from the Union for the Association and for Respondent.

Respondent also claims that it was inadequately represented by the Association, since its efforts to obtain relief from the Union's Funds fell on "unsympathetic ears" by the members of the negotiations committee, and that its insistence on the same start-time concessions given by the Union to the Long Island Group was not adhered to by the Association. However, as I have noted above, Respondent has fallen far short of establishing or even inferring that either of these positions by the Association was motivated by an alleged secret deal based on lax enforcement of the contract in exchange for payoffs.

Moreover, an examination of the bargaining itself does not reveal a scintilla of evidence that the negotiations in general, or the positions taken by the Association during the negotiations, were in any way affected or influenced by any of the legal proceedings against the Union, union officials, or Quadrozzi. Polsinelli was given full opportunity to present his views during the committee's caucuses and meetings, and where there were disputes his vote counted no more or less than that of any other member, including Quadrozzi. While Polsinelli asserted that larger companies had "more clout" than smaller companies such as Respondent, because of the threat of a "me too" contract being signed by these employers, this fact was known to Respondent prior to the start of negotiations, is not as "unusual circumstance," and has no connection to any legal problems involving the Union or the Association. Although the Association declined to pursue Polsinelli's request to demand concessions, in each case he was given reasons by the other members why this was not something that would likely produce an agreement by the Union.

As for the start-time issue, Polsinelli admitted that some members of the Association were not concerned about the issue because they were located in areas which were not affected by the Long Island contract. Other larger companies, were according to Polsinelli also not affected by the start-time issue, because Long Island employers do not compete with them. In fact, Polsinelli conceded that Respondent was the only company on the negotiation committee that had a significant concern about the start-time issue. None the less, because of the possible significance of the Union's retreat on

the most-favored-nations clause, the committee decided to hold firm, and in fact continued to absorb the Union's strike, until one member, City Ready Mix (located down the block from Respondent) announced that it was not worth it to stay on strike for an extra hour in the morning, and that if intended to sign a "me to" contract with the Union. At that point, Polsinelli correctly forsaw that the Association would "cave in" to the Union, and agree to a contract without the same start-time provisions given to the Long Island group. It is clear, as I previously found in my earlier decision that this was the sole reason that Respondent attempted to withdraw from negotiations at that time.

Because it is clear that Respondent's dissatisfaction with the course of bargaining is not an unusual circumstance justifying withdrawal from negotiations, and Respondent has not shown that any unlawful considerations impacted on the bargaining decisions of either party,[5] Respondent has failed to meet its burden of justifying its withdrawal.

Finally, Respondent relies on *NLRB v. David Buttrick Co.*, 361 F.2d 300 (1st Cir. 1966), which consistent with the Board's prior holding in *Bausch & Lamb Optical Co.*, 108 NLRB 1555 (1954), held that in a conflict of interest allegation, the "potential but not merely the actuality" must be assessed. Respondent seeks to apply that reasoning to the instant situation, and argues that the test for assessing the legality of Respondent's actions is not the actual effect on the negotiations of the wrongdoing by the participants, but rather the potential for danger which indicate that the negotiations might be affected. I disagree.

The *Bausch & Lamb* rationale, as applied by court in *Buttrick Co.*, supra, involves a totally different situation, with considerations involved not present herein. The issue in those cases is whether a sufficient conflict of interest can be presumed by virtue of the relationship between the Union or its funds with a competitor of the Employer, so as to justify the Employer in withdrawing recognition from the Union. In such a situation, the potential for a future conflict is considered, and questions of possible divided loyalty between the Union's role as collective-bargaining representative of the employees and its relationship with a competitor of the employer is assessed.

The issue here is quite different. The negotiations in issue have already taken place, and there is no issue of future conflicts or divided loyalty questions that may arise. Nor is there any claim that Respondent did or could withdraw recognition from the Union. Rather, the issue here is whether "unusual circumstances" were present when Respondent withdrew from negotiations sufficient to justify such withdrawal. It seems to me that an actual effect on the negotiations must be established by Respondent, or at the very least a reasonable probability that it was affected by the events proven by the legal proceedings presented by Respondent. As I have discussed above, Respondent has fallen short of establishing any such effect or even a reasonable probability that the negotiation were influenced by the alleged illegal conduct of the union officials or Association members.

Even if one were to attempt to apply a "potential" rather actual standard to assessing the effect on the negotiations by the alleged unlawful conduct, I do not believe that Respondent would be any more successful. I note again that Respondent has not established that any union officials ever made unlawful payments to members of the Association, or that any Association member was ever extorted by or made any illegal payments to officials of Local 282. It is also significant that Sasso, Probeyahn, and Bourgal who did receive unlawful payments from other employers were removed from participating in the negotiations on the Union's side before or shortly after the negotations began. Moreover, while Quadrozzi may have made unlawful payments to Unions, it was not established that any such payments were made by him to Local 282 officials.[6] Thus, even the potential for a conflict based as these facts is remote. Finally, as to Quadrozzi the evidence establishes that he was but only one out of seven members of the committee, that he said very little during the negotiations, and that he made no comments at all concerning the major issue which caused Respondent to withdraw from negotiations, the start-time clause. Thus even if one can presume that a "potential" conflict existed vis a vis Quadrozzi, his limited participation in the negotiations, negates any possible argument that even the "potential" conflict of Quadrozzi is sufficient to justify Respondent's withdrawal from negotiations.

Accordingly, based on the foregoing, I conclude that Respondent has failed to meet its burden of establishing the existence of the requisite "unusual circumstances," at the time that it attempted to withdraw from the Association and from negotiations.

III. CONCLUSION

In view of my findings discussed above, I reaffirm the Findings of Fact, Conclusions of Law, Remedy, Recommended Order,[7] and proposed notice that I set forth in my prior decision, issued on September 19, 1994.

[5] Indeed, the record establishes, based on Polsinelli's own testimony, that the decision of the Association to agree to a contract not to Respondent's liking was based on the realities of normal collective bargaining, as reflected by the effects of the Union's strike on the bargaining position of the Association's members.

[6] It is also notable that none of the alleged unlawful acts of any of the alleged wrongdoers, took place contemporaneously with the negotiations. Indeed the last such act occurred over 2 years before the negotiations began.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."